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98-348

No. 98-350

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

THE STATE OF TEXAS,

Petitioner,

v.

WILLIAM E. WALKER M.D.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I

The State of Texas raises the issue of Eleventh Amendment immunity from suit in federal court, with respect to bankruptcy issues, in light of the Court's decision in *Seminole Tribe*.

Does the State have a claim that is "ripe" for adjudication by the Court?

II

Here, the State removed the case, and availed itself purposefully of the jurisdiction of the federal courts.

Did not the State, by removing the case, waive its Eleventh Amendment immunity with respect to the "transaction and occurrence" being litigated in the case?

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STATUTE INVOLVED IN THE CASE

Bankruptcy Rule 4007(c) provides:

> A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a).

ADDITONAL STATEMENT OF THE CASE

I. THE STATE OF TEXAS REMOVED THE CASE.

This case began on February 9, 1995, when the State filed an action against Walker, sounding in breach of contract and conversion, in the 80th District Court of Harris County, Texas.

On August 10, 1995, Walker filed a counterclaim against the State, and a third-party claim against the Board of Regents and President of the University of Texas, under both state and federal law.

On September 25, 1995, *the State of Texas* removed the case in the posture of a plaintiff faced with a federal counterclaim.

Walker pointed out to the State that a plaintiff can never remove, even if faced with a federal question counterclaim, and that removal by the State was invalid. The State amended its pleadings over 5 months later, on March 8, 1996, to invoke removal jurisdiction in a third-party defendant (here, the Regents and President) faced with a federal question claim. (Please see Walker's Petition For Writ Of Certiorari for discussion of why this mode of removal was invalid also.)

The State thus availed itself purposefully of federal court jurisdiction, thereby waiving some of its Eleventh Amendment immunity.

II. THE STATE OF TEXAS KNEW OF WALKER'S BANKRUPTCY FOR OVER 2 YEARS BEFORE IT OBJECTED TO HIS DISCHARGE.

Walker informed his immediate supervisor in the State hierarchy of his bankruptcy filing at the time it occurred, September 1, 1992, almost 3 years before the State "objected" to Walker's discharge, on June 24, 1996, in its brief to the District Court. The State argues that the supervisor was an agent unempowered to receive knowledge of a bankruptcy.

It is undisputed, however, that the State's lawyers were informed of Walker's bankruptcy discharge defense to the State's claim against him in early 1994, almost 2½ years before the State filed its initial notice of objection. Such knowledge is memorialized by a writing in the record. State's Petition For Writ of Certiorari at A30.

Walker briefed, to the District Court, the issue of the untimeliness of the State's objection to his discharge, in his motion for summary judgment based on discharge in bankruptcy. The District Court did not reach the procedural issue of lack of timeliness, however, since it determined that the State's objection failed on substantive grounds. The issue was thus not before the Fifth Circuit, but remains a cogent factor in why the State's claim is unripe for adjudication.

REASONS FOR DENYING THE PETITION

I. THE STATE OF TEXAS DOES NOT PRESENT THE COURT WITH A CLAIM THAT IS RIPE FOR ADJUDICATION.

The State asks this Court to consider the issue of Eleventh Amendment immunity to federal court jurisdiction in the context of bankruptcy law after the *Seminole Tribe* decision. *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 114, 134 L. Ed. 2d 252 (1996). The State argues that the bankruptcy discharge of a debtor implies *per se* an affront to the Eleventh Amendment immunity of an unconsenting State, what the State calls an "in rem exception to the Eleventh Amendment."

Such argument is misplaced, however, and not on point with the facts of our case. In the usual case, the state is a known creditor, receives notice of the bankruptcy filing, and has the opportunity to waive, for a limited purpose, the Eleventh Amendment, appear in the bankruptcy proceedings, and protect its interests.

Here, however, the State of Texas was an unknown creditor ("creditor" here meaning claimant only), appearing with a claim in a Texas state court over two years after the debtor's bankruptcy discharge. Despite knowing of Walker's bankruptcy discharge one year before it filed suit, the State waived its right to object to Walker's discharge by not doing so in timely fashion. The State waived also part of its Eleventh Amendment immunity from federal jurisdiction by removing the case to the District Court (please see section II, below).

The State's second argument, that our case represents a potential result adverse to the Eleventh Amendment because of its procedural posture, is likewise misplaced. The State offers the Court a hypothet of an unconsenting state creditor whose rights are adjudicated in its absence. That scenario is different from the facts of our case, where no federal court ordered the State of Texas to do, or not do, anything, before the State waived some of its rights to jurisdictional immunity by removing the case.

An opinion on the hypothet advanced by the State would be merely advisory. Respondent Walker agrees with the State that a state's interests are important in a Eleventh Amendment analysis. The Eleventh Amendment is alive and well – an unconsenting state may not be haled into federal court, nor its rights affected in any meaningful way solely by a federal court judgment. Here, however, the State has consented.

The State's petition for review by this Court not only requests an advisory opinion, but presents a claim that is not ripe for adjudication.

The State has a mere contingent claim against Walker, based on an employment contract dispute under Texas state law that will be heard by a Texas state court. No court of competent jurisdiction has construed the contract. Should such a court construe the contract in Walker's favor, the State will have no claim whatsoever. Even if the State should win the contract construction dispute, no factfinder has found that Walker breached the contract.

Even if the factfinder decide that Walker breached, and the judgment be upheld by the Texas appellate

courts, the automatic stay of the Bankruptcy Code would block initial execution on the judgment. The State would have to petition the Bankruptcy Court to reopen the case over five years after the State knew of the problem, in order to litigate dischargeability of the debt. Such a motion would be untimely in the extreme.

Assuming, *arguendo,* that the initial lack of knowledge, by the State, of Walker's bankruptcy petition and discharge, tolled the 60-day limitations period for objections to his discharge, Bankr. R. 4007(c), the State filed a suit for damages in the state court over *one year* later, and contested dischargeability of the "debt" (based on its mere contingent claim) in the District Court, not the Bankruptcy Court, *two a half years* after it learned of Walker's discharge.

These responses were untimely, and constitute waiver of the right of objection to Walker's discharge.

The standard for "ripeness" analysis is clear. As the Court held unanimously in a recent case, "a claim is not ripe for adjudication if it rests upon contingent future events *that may not occur as anticipated, or may not occur at all* (emphasis added)." *Texas v. United States, et al.,* 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998). In that case, the Court opined " . . . we find it too speculative whether the problem Texas presents will ever need solving . . . "

The same conclusion obtains here. The State of Texas, in essence, says to this Court: "If the contract be construed in our favor, if the factfinder decide that Walker breached the contract, if the judgment be sustained on appeal, if the Bankruptcy Court agree to reopen the case, if the objection to discharge be rejected by the Bankruptcy

Court, and if the judgment be upheld by higher federal courts reviewing the case, *then* we suffer a result from which we ought to be immune under the Eleventh Amendment."

That is a large number of "if clauses". The claim by the State against Walker is far from being a "final decision".

This Court has stressed the need for a "final decision" in administrative proceedings and lower courts before an issue will be ripe for consideration by the Court. See, e.g., *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997).

The State presents the Court a question of law based on a putative legal claim that may fail to clear multiple future hurdles and is, thus, far from a final decision, and unripe for adjudication.

II. THE STATE OF TEXAS WAIVED SOME ELEVENTH AMENDMENT IMMUNITY BY REMOVING THE CASE.

The Court has not decided whether Eleventh Amendment immunity is a matter of subject matter jurisdiction or personal jurisdiction. *Wisconsin Dept. of Corrections v. Schacht*, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998). Eleventh Amendment immunity has the flavor of personal jurisdiction, since it can be waived. *Id.*, J. Kennedy, concurring. Subject matter jurisdiction is absolute, however – it can never be waived. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104, 72 L. Ed. 2d 492 (1982).

Logic would suggest that if Eleventh Amendment immunity *cannot* be a matter of subject matter jurisdiction, since it can be waived, it *must* be a matter of personal jurisdiction.

Personal jurisdiction is waived by filing a general appearance in a case. Justice Kennedy opined that it can be argued that consenting to removal waives Eleventh Amendment immunity and that such consent "amounts to a direct invocation of the jurisdiction of the federal courts." *Schacht*, supra.

Here, the State of Texas not only consented to removal, but was itself the removing party. That its removal was invalid (please see above, in the Additional Statement Of The Case, section I) in no way detracts from the conclusion that the State purposefully availed itself of federal jurisdiction. How much more cogent is the argument that a state waives Eleventh Amendment immunity when it, itself, removes the case, compared to merely assenting to the removal.

This is entirely consistent with the Court's holding in *Gardner*, cited both by Justice Kennedy, *id.*, and the Fifth Circuit in this case, State's Petition For Writ Of Certiorari at A19, that a State's voluntary filing of a proof of claim in a bankruptcy proceeding constitutes waiver of Eleventh Amendment immunity. *Gardner v. New Jersey*, 329 U.S. 565, 574, 67 S. Ct. 467, 91 L. Ed. 504 (1947).

Justice Kennedy also pointed out the patent unfairness of allowing a state to litigate consentingly in federal court, and then, if it loses, allowing it to assert Eleventh Amendment immunity to the resulting judgment. *Id.*

Respondent suggests to the Court that Eleventh Amendment immunity is waived with respect to the issue being litigated consentingly by a state in federal court – the specific "transaction and occurrence." We do not suggest in any fashion that the litigation of one issue, consentingly, by a state, waives the state's Eleventh Amendment immunity from federal jurisdiction to litigate a separate and independent issue.

Thus, by removing a case and litigating a certain issue, a state waives its right to Eleventh Amendment immunity from an adverse result in the litigation of that particular issue. Here, the State of Texas waived its Eleventh Amendment immunity to an adverse result in Walker's bankruptcy discharge defense, when it purposefully availed itself of federal court jurisdiction by removing the case.

CONCLUSION

The State of Texas has presented to the Court an Eleventh Amendment immunity claim that is not ripe for adjudication at this time. In addition, by removing the case, the State waived its Eleventh Amendment immunity to suit in federal court with respect to the specific subject matter of this litigation.

Respondent therefore opposes the grant of certiorari because of the lack of ripeness, but, should the Court decide to consider the Eleventh Amendment immunity

question, Respondent urges respectfully that the Court consider also the waiver issue.

Respectfully submitted,

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